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Docket No. 81-2332

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, a political subdivision of The Commonwealth of Virginia,

Petitioner.

vs.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA.

Respondent.

BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

on behalf of

The Community Redevelopment Agencies of the City of Los Angeles, The City of Long Beach, The City of Oceanside, The City of Anaheim. The City of Pasadena, The City of Culver City, The City of Santa Ana, The City of San Diego, The City of Santa Clara, The City of Garden Grove, and The City of San Jose. California

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TABLE OF CONTENTS

		Page
STATEMENT OF INTEREST OF THE AMICI CURIAE		1
SUMMARY OF ARGUMENT		11
ARGUMENT		
I.	BOTH THE RECORD IN THIS CASE AND THE RELEVANT LAW DEMONSTRATED THAT THE FEDERAL URA APPLIES ONLY INDIRECTLY TO THE STATES	13
	A. The Uniform Relocation Act does not apply directly to State projects.	14
	B. The Complaint in this case does not rest on the direct applicability of the URA to the States	17
	C. The Patttern of the Federal Statutes is to allow the States to assure that they will give relocation benefits in return for Federal grants.	18
II.	THE COMPLAINT, AS AGAINST THE FEDERAL GOVERNMENT, IS NOT LEASED UPON ANY STATUTORY DUTY IMPOSED UPON HUD.	20
III.	THE PETITIONER AUTHORITY MADE ITS DECISION AS A STATE AGENCY AND NOT AS AN ARM OF THE FEDERAL GOVERNMENT	21

		Page
IV.	THE COURTS BELOW LACKED SUBJECT MATTER JURISDIC-TION OF THIS CASE	25
	A. Decision Rendered by a State Agency is not Receivable in the Federal District Court	25
	B. There is no Federal Question involved in this case.	28
	C. Federal cases which could be construed as approving Federal District Court jurisdiction are either irrelevant or not based on relevant authority.	34
V.	ASSUMING PROPERTY JURIS-DICTION, THE COURT OF APPEAL ERRED IN ITS REVERSAL OF THE DISTRICT COURT DECISION	42
	A. Introduction	42
	B. Congress has not abrogated the common law rule	45
	C. The District Court's Decision Recognizes the Appropriate Rule	48
	D. Utility Relocation Costs Should Be Left to the Legislature	52
CONCLUSION		56

TABLE OF AUTHORITIES

CASES

	Page
Andrews v. City of San Bernardino 175 Cal.App. 2d 459, 346 P2d 457 (1959)	2
Appalachian Power Co. v. City of Huntington 210 S.E. 2d 471 (W.Va. 1974)	49
Artesian Water Co. v. State Dept. of Highways & Transportation 330 A.2d 432 (Del 1974)	49
Barnhart v. Brinegar 362 Fed. Supp. 464 (W.D. Mo. W.D. 1973)	21,36
Beaird-Poulan Dir. etc. v. Dept. of Highways 441 Fed. Supp. 866 (W.D. Ca. 1977) aff'd 616 Fed 2d 255 (5th Cir 1980) cert. den. (Rehnquist dissenting) 449 U.S. 971, 66 L.Ed. 2d 234, 101 S.Ct. 383; reh. den. 449 U.S. 1104, 66 L.Ed. 2d 832, 101 S.Ct. 903	37,39
Berman v. Parker 348 U.S. 26, 99 L.Ed. 27, 75 S.Ct. 98 (1954)	42
Boston v. United States 424 Fed. Supp. 259 (E.D. Mo. 1976)	40
Bristol Tennessee Housing Author'ty v. Bristol Gas Co. 407 S.W. 2d 681 (Tenn. 1966)	49

	Page
Califano v. Sanders 430 U.S. 99, 51 L.Ed 2d. 192, 97 S.Ct. 980 (1977)	39
Caramico v. Secretary of the Dept. of Housing & Urban Devel. 509 Fed 2d 694 (2d Cir., 1974)	34
Chicago, Rock Island & Pacific Railroad Co. v. Stude 346 U.S. 574, 98 L.Ed. 317, 74 S.Ct. 290 (1954)	11,26, 28,37
City of Center Line v. Michigan Bell Telephone 182 N.W. 2d 769 (Mich. 1970)	50
City of Columbus v. Indiana Bell Telephone Co. 281 N.E. 2d 510 (Ind. 1972)	50
Consumer Power Ca. v. Costle 615 Fed 2d 1147 (6th Cir. 1980)	49
Dawson v. U.S. Dept. of Housing & Urban Devel. 28 Fed. Supp. 328 (N.D. Ga. 1976)	35,40
Department of Transportation & Devel. of La. v. Beaird-Pouland, etc., Inc. (denial of cert; Justice Rehnquist dissenting) 449 U.S. 971, 66 L.Ed. 2d 234, 101 S.Ct. 383	12,20, 25
Estate of Hering 108 Cal.App. 3d 88, 166 Cal.Rptr. 298	47

	Page
Gully v. First Nat'l Bank in Meridian 299 U.S. 109, 81 L.Ed. 70, 57 S.Ct. 96 (1936)	12,30, 31,33
Janett v. Norfolk Redevelopment & Housing Authority 74 Fed. Supp. 585 (E.D. va. 1947) aff'd 169 Fed.2d 409 (4th Cir. 1948) cert. den. 335 U.S. 886 (1948)	23
Ledesma v. Urban Renewal Agency of Edinburg 432 Fed.Supp. 564 (S.C. Texas 1977)	35
Lewis v. Brinegar 372 Fed. Supp. 424 (W.D. Mo 1974)	37,38, 39,41
Logue v. United States 412 U.S. 521 37 L.Ed. 2d 121, 93 S.Ct. 2215 (1973)	24
Lone Star Gas Co. v. Moon Landrieu No. 80-100-C (E.D. Okla., March 30, 1981)	49
Moorer v. Dept. of Housing & Urban Devel. 417 Fed. Supp. 1261 (W.D. Mo. 1976)	35,40
Mountain States Telephone & Telegraph Co. v. Boise Redevelopment Agency 607 P.2d 1084, 101 Idaho 30 (1980)	49
National Surety Corp. v. Chamberlain 171 Fed. Supp. 591 (D.C. N.D. Texas 1959)	26,27

	Page
Nelson v. Brinegar 420 Fed. Supp. 975 (E.D. Wisc. 1976)	36
Pacific Telephone & Telegraph Co. v. Redevelopment Agency of the City opf Glendale 87 Cal.App. 3d 296, 151 Cal.Rptr. 68 (1978)	8,45, 49,52
Pacific Telephone & Telegraph Co. v. Redevelopment Agency of the City of Redlands 75 Cal.App. 3d 957, 142 Cal.Rptr. 584 (1978) (hrg. by Cal. Sup. Ct. den.)	8
Parden v. Railway of the Ala. St. Dock's Dept. 377 U.S. 184, 12 L.Ed.2d 233, 84 S.Ct. 1207 (1964)	38
Parlene Sportswear Company, Inc. v. Weinberger 513 Fed. 2d 835 (1st Cir. 1975). cert. den. 423 U.S. 925, 46 L.Ed.2d 252, 96 S.Ct. 269	34
Public Services of Oklahoma v. Harris No. 79-C-37-35 (N.D. Okla, Aug 22, 1980)	49
Redevelopment Agency of the City of Berkeley v. City of Berkeley 80 Cal.App. 3d 158, 143 Cal.Rptr. 633 (1978)	2
Saala v. McFarland 63 Cal.2d 124, 45 Cal. Rptr. 144 (1965)	47

	Page
Seeherman v. Lynn 404 Fed. Supp. 1318 (M.D. Pa 1975)	40
So. Union Gas Co. v. City of Artesia 472 P.2d 368 (N. Mex. 1970)	49
Tullock v. State Highway Comm of Mo. 507 Fed 2d 712 (8th Cir 1974)	37,38 40
United States v. Orleans 425 U.S. 807, 48 L.Ed. 2d 390, 96 S.Ct. 1971 (1976)	25
Whitman v. State Highway Comm'n of Mo. 400 Fed. Supp. 1040 (W.D. Mo. 1975)	40
Will-Tex Plastic Mfg. Inc. v. Dept. of Housing and Urban Devel. 347 Fed. Supp. 903 (E.D., Pa. 1972)	36

FEDERAL STATUTES

AND REGULATIONS

	Page
5 U.S.C. §§701-706 ("APA")	39,40,41
28 U.S.C. §1331(a)	12,28,41
42 U.S.C. §1437	4
42 U.S.C. §1451(b)	18
42 U.S.C. §1452(b)	4
42 U.S.C. §1453	17,18
42 U.S.C. §1455	18
42 U.S.C. §1466	4
42 U.S.C. §4601 et seq. ("URA")	6,13,14,15, 16,17,21,27,28,29,34,35,39,45,47,48,52
42 U.S.C. §4601(6)	8,9
42 U.S.C. §4602(a)	36
42 U.S.C. §4622	15
42 U.S.C. §4623	15
42 U.S.C. §4624	15
42 U.S.C. §4625	16
42 U.S.C. §4626	16
42 U.S.C. §4627	16
42 U.S.C. §4628	16
42 U.S.C. § 4630	7,18,35
42 U.S.C. §4651	16

	Page
42 U.S.C. §4652	16
42 U.S.C. §4653	16
42 U.S.C. §4654	16
42 U.S.C. §5301 et seq.	4
Public Law No. 92-495 (Dist. of Columbia Public Utilities Reimbursement Act of 1972)	54
24 CFR §570.450 et seq.	4
42 CFR	20,21,29

STATE CONSTITUTIONAL PROVISIONS AND STATUTES

	Page
California	
Constitution	
Art XIIIA ("Prop. 13")	5
Art XVI §16	3
Government Code	
§7260	6,7,8,47
§7272.3	6
Health & Safety Code	
33000 et seq (Community Redevelopment Law)	1,2
§33030	2
§§33035-33039	2
§33037(c)	2,3
§33071	1,2
§33415	6
§§33600-33601	3
§§33670-33679	4,5
Public Utilities Code	
§30631	51

	Page
Streets & Highways Code	
§702	51
§703	51
Water Code	
§8617.5	51
Virginia	
§§9-6, 14:16(ii)	28
§§9-6, 14:40	28
§25-235 et seq. ("Va.URA")	24,27,47
§25-238	6,23 28
§25-239(a)	23
§36-1 et seq.	23
§36-26	24

ARTICLES

	Page
Wescher, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law & Contemp. Prob. 216 (1948)	27

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STATEMENT OF INTEREST OF THE AMICI CURIAE

These California redevelopment agencies, political subdivisions of the State of California, respectfully submit this brief amicus curiae pursuant to Rule 36 of the Rules of this Court.

1. Introduction

Each of these amici is a public body, corporate and politic, created pursuant to the Community Redevelopment Law of the State of California, (California Health and Safety Code §§ 33000 et seq.), and exercising the powers provided therein. A fundamental purpose of the California Legislature in enacting the Community Redevelopment Law was "to expand the supply of low and moderate-income housing, to expand employment opportunities for jobless, underemployed, and low-income persons, and to provide an environment for the social, economic, and psychological growth and well-being of all citizens,"

(Calif. Health & Safety Code § 33071) through the elimination and prevention of blight (Calif. Health & Safety Code §§ 33030, 33035-33039).

In carrying out these governmental functions of state concern, (Calif. Health & Safety Code § 33037, subd. (c)), these redevelopment agencies operate as an administrative arm of the State. Redevelopment Agency of the City of Berkeley v. City of Berkeley 80 Cal.App.3d 158, 143 Cal.Rptr. 633, 639 (1978); Andrews v. City of San Bernardino 175 Cal.App.2d 459, 346 P.2d 457, 459 (1959).

Under the California Community Redevelopment Law, redevelopment agencies in California are authorized to spend public money and acquire private property to further the interest of the public health, safety, and welfare of the State and of the communities in which blighted areas exist (Calif. Health & Safety Code § 33037,

subd.(c)). A redevelopment agency may borrow money or accept financial assistance from the State or the Federal Government, and may borrow money (by the issuance of bonds or otherwise) or accept financial or other assistance from any private lending institution or any public or private source to carry out the purposes of the California Community Redevelopment Law (Calif. Health & Safety Code §§ 33600-33601).

Although the redevelopment agencies have no taxing authority, a primary source of funding for the redevelopment agencies is the use of "tax increment" generated by funding for the redevelopment activities; that is, an allocation to the redevelopment agencies of a portion of the increase in property taxes resulting from increased property valuation because of new development in a redevelopment project area after the adoption of a redevelopment plan. (See: Calif. Constitution, Article XVI, Section

16; Calif. Health & Safety Code §§ 33670-33679).

Another source of funding for the California redevelopment agencies has been federal assistance, including assistance provided pursuant to various programs administered by the Department of Housing and Urban Development ("HUD"). A number of HUD programs have provided funding or other assistance for redevelopment activities in California. These are the federal rehabilitation assistance programs authorized by 42 U.S.C. § 1452b (the "Section 312" program) and 42 U.S.C. § 1466 (the "Title I" program), the low-income housing assistance program authorized by 42 U.S.C. § 1437 et seq. (the "Section 8" program) and the Community Development Block Grant program authorized by 42 U.S.C. § 5301 et seq., including the program of Urban Development Action Grants set forth in the HUD regulations at 24 CFR § 570.450 et seq.

The amounts available to redevelopment agencies under various sources of funding have been decreasing in recent years. In California, the amount of "tax increment" available under Health & Safety Code § 33670 et seq. has, since 1978, been subject to the property tax limitations of "Proposition 13" (Cal. Const. Art. XIII A). In addition, the amount of federal assistance available has been decreased. Thus, the effect of imposing additional expenditure requirements upon redevelopment agencies, (i.e., to reimburse private utility companies for relocating their facilities), will be to reduce the scope of the actual redevelopment activities which an agency may perform, to postpone desperately needed low and moderate income housing projects, and to prolong the existence of blight.

When it acquires property in order to carry out its functions under the Community Redevelopment Law, a redevelopment agency

is subject to the California Relocation Assistance Law, Government Code § 7260 et seq., and is obliged to make the payments required thereby. (Calif. Health & Safety Code § 33415). The California Relocation law is similar to both the Federal Uniform Relocation Act (Title 42 USC § 4601 et seq.) ("URA") and the Virginia Uniform Relocation Act (Code of Va. § 25-235 et seq.)

California's relocation law allows both for payments to defined persons and additional payments so as to permit redevelopment agencies to obtain federal assistance for their projects. California Government Code Section 7272.3 provides:

> It is the intent of the Legislature, by this chapter, to establish minimum requirements for relocation assistance payments by public entities. This chapter shall not be construed to limit any other authority which a public entity may have to make other relocation assistance payments, or to make any relocation assistance payment in an amount which exceeds the maximum amount for such payment authorized by this chapter.

> Any public entity may also, make any other relocation assistance payment, or may make any relocation assistance payment in an amount which exceeds the maximum amount for such payment authorized by this chapter, if the making of such payment, or the payment in such amount, is required under federal law to secure federal funds.

This is State authority to allow redevelopment agencies to provide assurances to the Federal Government that the requirements of 42 U.S.C. § 4630 are being met in order to obtain a grant or other assistance.

In defining persons eligible for relocation assistance, the California Relocation Assistance Law identifies those persons eligible for relocation assistance in a manner closely akin to the comparable federal statute. A "displaced person" is defined (in pertinent part) in the California Government Code § 7260 as follows:

> "(c) 'Displaced person' means any person who moves from real

> property, or who moves his personal property from real property, as a result of the acquisition of such real property, in whole or in part, by a public entity or by a person having an agreement with or acting on behalf of a public entity, or as the result of a written order from a public entity to vacate the real property, for public use."

The similarities between the principal provisions of California Government Code § 7260 and 42 U.S.C. § 4601 (6) are rather obvious.

In construing California Government Code § 7260 et seq., California courts have held that those provisions do not override the common law rule that public utilities are not included in the definition of "displaced persons" (See: Pacific Telephone & Telegraph Co. v. Redevelopment Agency of the City of Redlands 75 Cal.App.3d 957, 142 Cal.Rptr. 584 (1978) (hrg by Cal. Sup. Ct. den.) and Pacific Telephone & Telegraph Co. v. Redevelopment Agency of the City of

Glendale, 87 Cal.App.3d 296, 151 Cal.Rptr. 68 (1978).

The opinion of the Fourth Circuit in this case, construing Title 42 U.S.C. § 4601 (6) could be used to interpret other similar State statutes in California and throughout the country. Thus, one impact of the appellate decision in this case is rather obvious: it will permit utility companies to make yet another attempt to overturn the long-standing rule made by the courts of the very States which regulate them.

But there is a further, and more direct adverse result of the Fourth Circuit decision. It will, if affirmed, diminish the ability of California Redevelopment Agencies to carry out their essential governmental functions when receiving federal assistance by diverting scarce monetary resources from activities necessary to eliminate blighting conditions to reimbursing privately-owned, for-profit

utility companies for their costs in relocating their facilities when such relocation is required for redevelopment purposes. The practical effect of the Court of Appeals' decision will be to reduce the ability of State and local governments to eliminate blight in their communities by imposing upon them additional financial burdens at a time when the resources available for such purposes are being diminished or eliminated.

Of paramount importance to these amici curiae is that the decision of the Fourth Circuit would, at least implicitly, authorize review by federal courts of the decisions of State agencies pursuant to their authority under State law. Because the granting or denying of benefits by such an agency does not arise "... under the Constitution, laws or treaties of the United States...", and because this case is a review of a decision of a State agency,

the Federal District Court had no jurisdiction to proceed with the case.

SUMMARY OF ARGUMENT

The Respondent's Complaint is based upon Federal statutes which do not, even impliedly, extend a cause of action for payment of benefits. Yet that is exactly what, in reality, the Respondent seeks. The Federal Uniform Relocation Act may support other causes of action but not the one brought by the Respondent. Thus, the Respondent's Complaint does not show jurisdiction on two grounds:

First, that Complaint is nothing more than an appeal from an administrative decision of a State agency, and this Court has stated that district courts do not sit to review such decisions (See Chicago, Rock Island & Pacific Railroad Co. v. Stude 346 U.S. 574, 581, 98 L.Ed. 317, 74 S.Ct. 290 (1954)) and the opinion of Justice Rehnquist (dissenting from an order denying

certiorari) in Department of Transportation & Devel. of La. v. Beaird-Poulan, Inc. 449 U.S. 971, 66 L.Ed.2d 234, 101 S.Ct.383, rendered after the Complaint and Answer were filed herein).

Second, the clear statutory scheme shows that there is no right, under the Federal statutes relied upon by the Respondent, to bring an action against the Federal Government for relocation benefits. Thus, the Respondent's Complaint does not show that a Federal question has been raised. This Court has held that the existence of a question of interpretation of Federal statute is insufficient to support Federal question jurisdiction and Title 28 U.S.C. § 1331(a) (See: Gully v. First Nat'l Bank in Meridian 299 U.S. 109, 81 L.Ed 70, 57 S.Ct. 96 (1936)). In viewing the actual claims and progress of the Complaint, it is evident that there is no Federal jurisdiction.

Assuming there was jurisdiction, the Court of Appeals was incorrect in ignoring the impact of the Uniform Relocation Act on common law. The rule that public utilities are not reimbursed for their relocation expenses unless specifically authorized by legislative enactment has been accepted throughout the country and even by Congress itself. The existence of that rule and the effect of a contrary rule on the people of our cities, demand that the decision of the Court of Appeals be reversed.

ARGUMENT

I.

BOTH THE RECORD IN THIS CASE AND THE RELEVANT LAW DEMONSTRATE THAT THE FEDERAL URA APPLIES ONLY INDIRECTLY TO THE STATES

Although these California amici agree with the result reached in the District Court denying relocation assistance to Respondent Chesapeake & Potomac Telephone Co. of Virginia ("C & P"), they contend that neither the District Court nor the Circuit

Court of Appeals had subject matter jurisdiction. A review of the record, the URA, and pertinent decisions, shows that this case involves the interpretation of state law, that the URA does not directly apply to the States and that a review of a State administrative decision is not within the jurisdiction of a federal district court.

A. The Uniform Relocation Act does not apply directly to State projects

In considering the authority under which the Petitioner Norfolk Redevelopment & Housing Authority ("Petitioner Authority" or "NHRA") was acting in denying the claim of C & P, it is appropriate to first consider whether Congress manifested an intent to apply the URA directly to the States. A review of the URA shows no such intent. Nowhere does Congress express any desire to supplant State law.

First, the URA's primary emphasis is upon the proper payment of relocation

benefits when a federal project is undertaken. With limited exceptions, the URA refers wholly to "Federal programs or projects" and to "Federal agencies." The URA sets out requirements for those Federal agencies when they undertake such projects. Title 42 U.S.C. § 4622 (regarding the payment of moving and related expenses) provides one of many examples:

> "(a) Whenever the acquisition of real property for a program or project undertaken by a Federal agency in any State . . . ." (Emphasis added).

Title 42 U.S.C. § 4623 (regarding replacement housing for homeowner-Mortgage insurance) provides:

> "(a)(1) In addition to payments otherwise authorized by this title, the head of the Federal agency shall . . . ." (Emphasis added).

Title 42 U.S.C. § 4624 (regarding replacement housing for tenants) likewise directs "The head of the Federal agency" to make certain payments. Similar references

to displacement resulting from Federal programs or projects or directions to the "head of the Federal agency" are found in Title 42 U.S.C. §§ 4625, 4626, 4627, 4628, 4651, 4652, 4653, and 4654.

The clear pattern established by these references is that Congress imposed certain obligations regarding relocation on Federal agencies engaging in Federal projects.

The only direct application of the URA to State agencies occurs when the State agency acts as the agent of the Federal government. This is taken up in Title 42 U.S.C. § 4628:

> "Whenever real property is acquired by a State agency at the request of a Federal agency for a Federal program or project, such acquisition shall, for the purpose of this Act, be deemed an acquisition by the Federal agency having authority over such program or project."

Thus, at least implicitly, when a State agency acts as the agent for a Federal agency in carrying out a Federal project, it

is bound directly by the provision of the URA.

The URA does not contain any other provisions which directly bind the State to its requirements or which bind HUD to paying relocation benefits for a State project. Just as importantly, there is no direct conferral of authority on the State to pay relocation expenses in connection with a State project in the URA.

B. The Complaint in this case does not rest on the direct applicability of the URA to the States

The Complaint, (Joint Appendix [hereinafter "J.A."] p. 1-14), refers to the character of the Federal involvement in the projects which are the subject of this action.

Paragraph 3 of the Complaint states that HUD contracted with the Petitioner Authority to make grants pursuant to Title 42 U.S.C. § 1453. But here again, there is no direct requirement, either on HUD or on

State agencies to pay relocation benefits in connection with State projects. The fundamental duty is one which is imposed on the Secretary of HUD to comply with various restrictions before entering into a grant contract (see Title 42 U.S.C. §§ 1451(b) and (c), 1453 and 1455).

Since none of the other statutes cited by Respondent C & P impose a direct duty on the States to extend relocation benefits, it follows that such a requirement, if it exists, is placed upon them indirectly.

C. **The pattern of the URA is to allow the States to assure that they will give relocation benefits in return for Federal grants**

The only provision that deals with the providing of relocation benefits by State agencies engaging in State projects is Title 42 U.S.C. § 4630, which provides:

> "Notwithstanding any other law, the head of a Federal agency shall not approve any grant to, or contract or agreement with, a State agency, under which Federal financial assistance will be

> available to pay all or part of the cost of any program or project which will result in the displacement of any person ... unless he receives satisfactory assurances from such State agency that --
>
> (1) fair and reasonable relocation payments and assistance shall be provided to or for displaced persons, as are required to be provided by a Federal agency under sections 202, 203, and 204 of this title;
>
> (2) relocation assistance programs offering the services described in section 205 shall be provided to such displaced persons;
>
> (3) within a reasonable period of time prior to displacement, decent, safe, and sanitary replacement dwellings will be available to displaced persons in accordance with section 205(c)(3)." (Emphasis added).

Thus, a State agency may not receive federal assistance unless it assures the Federal agency that the same sort of assistance as required of Federal agencies by the Act will be provided in those State projects assisted with federal funds. It is the carrot of federal funds (which may be

withheld) and not the stick of private suits regarding State agency relocation decisions that Congress chose as the means of providing relocation payments to those displaced by State agencies in federally-assisted projects. (See the dissent of Justice Rehnquist in the denial of certiorari in Department of Transportation & Devel. of La. v. Beaird-Poulan, Inc., supra. (Also see 42 CFR §§ 42.1 and 42.5(a)).

II.

THE COMPLAINT, AS AGAINST THE FEDERAL GOVERNMENT IS NOT BASED UPON ANY STATUTORY DUTY IMPOSED UPON HUD

What has been said thus far shows that the duty of HUD under applicable statutes, is to assure itself, before approving a grant or entering into a grant contract, that the State agency will extend relocation benefits. But there is no allegation that the assurances were not made by the

Petitioner Authority, or that HUD breached any other statutory duty (see Complaint, J.A. pp. 1-14). Instead, the Complaint is based upon the theory that the State agency did not give those benefits which it should have. The above examination of the URA shows that there is no requirement therein for the Secretary to order compliance with its terms.[1]

III.

THE PETITIONER AUTHORITY MADE ITS DECISION AS A STATE AGENCY AND NOT AS AN ARM OF THE FEDERAL GOVERNMENT

The record is replete with references to the character of the action taken. It

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[1] It may be argued that the Complaint, properly drafted, would refer to Title 42 of the Code of Federal Regulations. But, in fact, the Complaint does not purport to sate a cause of action by C & P as a "third party beneficiary" of the Code of Federal Regulations. Nor does it rely on any interpretation of the CRF as to its eligibility for payments thereunder. In any case, such a theory, even if it had been presented, would not provide a federal cause of action (see the logic and cases set forth in Barnhart v. Brinegar (W.D. Mo., 1973) 362 Fed. Supp. 464, 473-478 and argument infra).

was not a federal action, but one undertaken by a State agency pursuant to its authority under State law. For example, the Complaint identifies the Petitioner Authority as "... a political subdivision of the State of Virginia ...." (J.A. p.2, par.1). The redevelopment/conservation plans were adopted by the Petitioner Authority and the City of Norfolk, Virginia (J.A. pp 38-39). The Petitioner Authority acquired the land abutting the streets where the Respondent's lines were laid (J.A. p. 39). The City of Norfolk closed those streets (J.A. pp. 40-41). The Petitioner Authority has disposed of, or offered to dispose of the land formerly constituting the said streets (J.A. pp 41-42). The Petitioner Authority acquired property within the project areas pursuant to the redevelopment plans adopted by the Authority and the City (J.A. p. 44). The approval of the utility relocation was performed by the Authority (J.A. p. 45).

Further supporting the State character of the decision is the law of the State of Virginia. Its provisions identify redevelopment agencies as creatures of the State. The Petitioner Authority is an agency created under State law charged with certain redevelopment and housing responsibilities (see 36 Code of Va. § 36-1 et seq., and Janett v. Norfolk Redevelopment & Housing Authority 74 Fed.Supp. 585, (E.D. Va., 1947) aff'd. 169 Fed. 2d 409 (4th Cir. 1948), cert. den. 335 U.S. 886 (1948)). Specific among those responsibilities is the requirement to pay relocation benefits. Code of Va. §§ 5-235 et seq. set forth these requirements, and § 25-239(a) provides the general rule:

> "(a) Whenever the acquisition of real property for a program or project undertaken by a State agency will result in the displacement of any person, on or after April ten, nineteen hundred seventy-two, such agency shall make fair and reasonable relocation payments to displaced persons as required by this chapter...."

Nowhere in the relocation assistance chapter of the Virginia Code (§ 25-235) and nowhere in the general powers provisions of the Virginia Code is there any provision which magically turns these State powers into federal benefits. The only Virginia statutory provision which deals with this point is § 36-26 of the Virginia Code which, like the comparable California statute, allows Virginia redevelopment and housing authorities to make payments so as to comply with conditions for the receipt of federal funds.

In considering the liability of the Federal Government for the negligent acts of State and private employees, this Court has repeatedly pointed out that contracts or grants to the State or private employers do not make the employees agents of the United States (see Logue v. United States 412 U.S. 521, 37 L.Ed.2d 121, 93 S.Ct. 2215

(1973) and United States v. Orleans 425 U.S. 807, 48 L.Ed.2d 390, 96 S.Ct. 1971 (1976)).

From all of the above, it is clear that the receipt of a grant from HUD to assist in local redevelopment does not turn a State agency into a Federal one. Even a conditional grant does not make the Petitioner Authority into an agent of the Federal Government.

IV.

THE COURTS BELOW LACKED SUBJECT MATTER JURISDICTION OF THIS CASE

A. A Decision Rendered by a State Agency is not Reviewable in the Federal District Court.

In an opinion which was rendered on November 3, 1980, (well after both the Complaint and Answer were filed in this case), Justice Rehnquist discussed the question of federal district court jurisdiction of cases such as this (Department of Transportation & Devel. of La. v. Beaird-Poulan, Inc. supra, 449 U.S. 971).

Justice Rehnquist's dissent in that case is, these California amici contend, the correct view of the law. Certainly, without more, no federal district court has jurisdiction to hear an appeal from a State administrative decision. As this Court said in Chicago, Rock Island & Pacific Railroad Co. v. Stude 346 U.S. 574, 581, 98 L.Ed 317, 74 S.Ct. 290 (1954),

> "The United States District Court for the Southern District of Iowa does not sit to review on appeal taken administratively or judicially in a state proceeding."

This policy was utilized by the District Court in National Surety Corp. v. Chamberlain 171 Fed.Supp. 591 (N.D. Texas 1959), as one of its reasons for dismissing an insurance carrier's appeal from a State industrial accident board. In rendering its decision, the Court stated:

> "The Stude case seems to hold clearly enough that a federal district court, being limited to original jurisdiction, is without authority to try and adjudicate a

> controversy by 'appeal' or review de novo prosecuted from administrative proceedings initiated and conducted under the authority of a state statute; and, of course, under such ruling the subject of amount in controversy became altogether immaterial to the decision." (171 Fed.Supp at p. 597).

The National Surety Court proceeded to explain the policy behind its ruling, which policy applies to this case as well. Quoting from Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law and Contemp. Prob. 216 (1948), the Court stated:

> "'This method has the virtue of preserving for final resolution by state agencies any issues in the case that turn upon state law; the more numerous or weightier such state ingredients, the more important it may be to have them first determined by state courts.'"

A comparison of the State and Federal URA is enough to convince one that a State court in interpreting State law, could have fully dealt with all of Respondent C & P's questions, and may possibly have

interpreted "displaced person" (Code of Va. § 25-238 (c)) so as to extend relief to the Respondent. Thus, the policies behind this Court's decision in Rock Island & Pacific Railroad Co. v. Stude, supra, apply to this case.

State law allows for a review of decision such as this (Code of Va. §§ 9-6, 14:16(ii) and 9-6, 14-40), and Respondent should have pursued its review there.

B. There is no Federal Question involved in this case.

There is another reason why this Court should determine that the Federal District Court did not have jurisdiction of this case: this is not an action arising "... under the Constitution, laws, or treaties of the United States." (Title 28 U.S.C. § 1331(a)).

The Respondent C & P brought this action, and it chose to base it on its alleged entitlement to benefit payments pursuant to 42 U.S.C. §§ 4601 et seq. (J.A.

pp. 2 & 13). The Respondent further requested relief in the form of a declaratory relief interpreting Title 42 U.S.C. §§ 4601 et seq. to its liking and a writ of mandate compelling the Secretary of HUD to order the State agency to pay benefits.

But, as has previously been pointed out, Title 42 U.S.C. §§ 4601 et seq. do not require the Secretary to do any such ordering. Instead, it requires him to obtain assurances before approving a grant. But the record at least implies that this approval was given long before the Complaint was filed (see J.A. p. 3, 65).

Thus, the Respondent chose to rely on a Federal statute which does not confer the relief he seeks.[2] (The Petition for Writ of

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[2] The Respondent may rely on 42 CFR for the proposition that the Secretary has the power thereunder to make the order requested. There are several difficulties with this proposition. First, 42 CFR §42.5 requires agreeing State agencies to abide by the terms of 42 CFR, not some statute. No attempt at interpreting the regulations

Certiorari filed before this Court further indicates that the amounts approved have been paid and "settled" and that HUD will not pay any more. (The clear inference is that the Petitioner Authority may now be obliged to pay amounts which were not meant to be covered by the grant or any other source of income to the Authority).

It is clear that Federal Courts require more than just an interpretation of a Federal statute to obtain jurisdiction. The right of action must be a Federal one as well. In addition, the Federal question must resolve the dispute. This Court made these statements in Gully v. First Nat'l

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2 (cont.) was requested by Respondent below. Nor did the Respondent rely on any regulation for its relief. Second, there is a substantial question as to the existence of a right of action on the basis of an agreement between HUD and the Petitioner. Barnhart v. Brinegar, supra, points out that if there is no other judicially recognized right, an agreement to abide by regulations will not create one (see 362 Fed.Supp. 473-478).

Bank in Meridian 299 U.S. 109, 81 L.Ed. 70, 57 S.Ct. 96 (1936).

Gully involved a suit by the Mississippi State Tax Collector against a bank which succeeded a dissolved bank and which had agreed to assume all of the dissolved bank's obligations. Among those obligations was a state tax, which, of course, can only be imposed on a National Bank consistently with Federal statutes. The case was removed from the State courts to the Federal District Court.

In reversing the Federal Appellate decision, this Court stated:

> "Not every question of federal law emerging in a suit is proof that a federal law is the basis of a suit. The tax here in controversy if valid as a tax at all, was imposed under the authority of a statute of Mississippi. The federal law did not attempt to impose it or confer upon the tax collector authority to sue for it. True, the tax, though assessed through the action of the state, must be consistent with the federal statute.... [But] that there is a federal law permitting such taxation does not

> change the basis of the suit, which is still the statute of the state, though the federal law is evidence to prove the statute valid."

The Court proceeded further:

> "Here the right to be established is one created by the state. If that is so, it is unimportant that federal consent is the source of state authority."

In this case, the authority to give relocation benefits is not found in Federal law. In order to receive them, an applicant must show that he or she is entitled to them under State law. If no redevelopment project is undertaken by the State agency, or if the State agency does not require the claimant to move, then there is no State authority to give benefits, and the Federal law does not create any.

Of course, when the State agency does these things, it must, in order to qualify for Federal assistance, take action within the limits of the Federal condition (just as a State can tax a national bank only within

the limits of Federal Statute). But those limits do not change the basis of the relocation benefit authority. It is not Federal, but State.

Although Respondent's Complaint is restricted to consideration of Federal statutes, the Federal nature of the asserted rights is illusory. As has been previously pointed out, the Federal statutes cited do not relate either directly to the States or to the sort of action by the Secretary of HUD requested by the Respondent in its complaint. The substantive regulations have never been raised by it (see footnote 2 herein).

Under these circumstances, the rationale expressed by this Court in Gulley v. First Nat'l Bank in Meridian, supra, ought to be applied. In reality there is no Federal question, only a further review of a State agency determination.

C. **Federal Cases which could be construed as approving Federal District Court jurisdiction are either irrelevant or not based on relevant authority.**

In response to all of the arguments presented above, the Respondent may reply that there are many Federal District and Appellate Court cases which ought to support district court jurisdiction in this case. In fact, however, those cases do not support such jurisdiction.

The Federal cases which have thus far dealt with the URA can be divided into four groups.

First, there is a group of URA cases in which an attack is made on a Federal program being undertaken by a Federal agency. (See: Parlane Sportswear Company, Inc. v. Weinberger, 513 Fed.2d 835 (1st Cir.) cert. denied, 423 U.S. 925, 96 S.Ct. 269, 46 L.Ed. 2d 252 (1975); Caramico v. Secretary of The Department of Housing and Urban Development, 509 Fed.2d 694 (2d Cir.,

1974); Dawson v. U.S. Dept. of Housing and Urban Development, 428 Fed.Supp. 328 (N.D. Ga., 1976); (Moorer v. Dept. of Housing and Urban Development, 417 Fed.Supp. 1261 (W.D. Mo., 1976). Since the URA applies directly to the Federal agencies, these cases do not apply to the discussion of this case.

Second, there is a group of cases where a Federally-assisted State project is involved, but where the attack is based on the claim that the Federal agency did not receive adequate advance assurances from the State agency to approve the grant or contract, pursuant to Title 42 U.S.C. §4630. (See: Jones v. District of Col. Redevelopment Land Agency, 499 Fed.2d 502 (1st Cir., 1974) affirmed 488 Fed.2d 559 (9th Cir. 1973), cert. denied 409 U.S. 890, 93 S.Ct. 105, 34 L.Ed. 2d 147 (1971)). Obviously, when a plaintiff is attacking a Federal official to enforce a mandate of Federal statute on that official, juris-

diction is present in the appropriate case. There is no relevance to this case where, in essence, the Respondent is suing to "clear up" a Federal statute in the hope that such a clarification will result in an order to the Federal official to order a State official to pay benefits to the Respondent.

Third, there is a group of cases in which the plaintiffs are challenging State agency acquisition procedures. (See: Nelson v. Brinegar. 420 Fed.Supp. 975 (E.D. Wisc. 1976); Barnhart v. Brinegar, supra; Will-Tex Plastic Mfg., Inc. V. Dept. of Housing and Urban Development, 347 Fed.Supp. 903 (E.D. Pa. 1972). Since 42 U.S.C. § 4602 (a) bars all judicial review of acquisition procedures, these cases are also not relevant to this discussion.

Fourth, there are cases which have held or implied that Federal courts do have jurisdiction to hear reviews of State agency relocation benefit decisions in

connection with Federally-assisted projects. The analysis in those cases is not adequate or is simply irrelevant.

In considering these cases, it should be pointed out that none of them consider Chicago, Rock Island & Pacific Railroad Co. v. Stude, supra, or later references to it. As a result, the prohibition against utilizing Federal Courts to review State agency decisions is not discussed.

Three cases considering Federal Court jurisdiction (at least impliedly are Tullock v. State Highway Comm. of Mo. 507 Fed 2d 712 (8th Cir. 1974); Lewis v. Brinegar 372 Fed.Supp. 424 (W.D. Mo. 1974); and Beaird-Poulan Div. etc. v. Dept. of Highways, 441 Fed.Supp. 866 (W.D. La. 1977) aff'd. 616 Fed.2d 255 (5th Cir 1980), cert. den. (Rehnquist dissenting), supra.

(1) Tullock v. State Highway Comm of Mo., supra, is actually a case involving sovreign immunity (see 507 Fed. 2d at p. 715). The Court in that case did not take up the question of which court had jurisdiction, only that the State agency can be sued. Parden v. Railway of the Ala. St. Dock's Dept. 377 U.S. 184, 12 L.Ed. 2d 233, 84 S.Ct. 1207 (1964), relied on by the Tullock court does not give any additional help, since it, too, deals with the issue of sovreign immunity. In Parden, the Federal statutes deemed controlling explicitly open the doors of the Federal Courts to tort claims involving interstate carriers (see 377 U.S. at p. 185-186). Thus, Tullock does not consider the issue of Federal court jurisdiction as opposed to that of the State courts.

(2) Lewis v. Brinegar, supra did not involve a review of a State agency benefit decision, but of a Fedral agency adoption of

a regulation under the URA. The Court determined that it had jurisdiction because of the Federal Administrative Procedure Act (Title 5 U.S.C. §§ 701-706). Since the Court rendered its opinion in 1974, it could not have considered this Court's decision in Califino v. Sanders 430 U.S. 99, 51 L.Ed.2d 192, 97 S.Ct. 980 (1977) which holds that the Administrative Procedure Act is not an independent grant of subject matter jurisdiction on Federal District Courts. Thus, the logic of Lewis v. Brinegar, supra, does not apply. The remainder of the jurisdiction discussion in that case deals with pendent jurisdiction over state claims which are related to the Federal claim. Since there is, in actuality, no Federal claim made in this case, this later discussion is not applicable.

(3) Beaird-Poulan Div. etc. v. Dept. of Highways, supra, also contains language which might support Federal District Court

jurisdiction in this case. But that language (441 Fed.Supp at p. 869) is no more than a citation of various cases. Those cases are Tullock v. St. Highway Comm'n etc. supra (which is a soverign immunity case); Ledesma v. Urban Renewal Agency of Edinburg 432 Fed.Supp. 564 (S.D. Texas 1977) (which relies totally on application of the Administrative Procedures Act; 432 Fed.Supp. at p. 566); Dawson v. U.S. Dept. of HUD, supra, (which involves a Federal program undertaken by a Federal agency); Moorer v. Dept. of HUD, supra, (to the same effect); Boston v. United States 424 Fed.Supp. 259 (E.D. Mo. 1976) (which does not provide any explanation for its exercise of jurisdiction; 424 Fed.Supp. at p. 266); Seeherman v. Lynn 404 Fed.Supp. 1318 (M.D. Pa. 1975) (which involved a Constitutional question rather than a statutory one); Whitman v. State Highway Comm'n of Mo, 400 Fed.Supp 1040 (W.D. Mo. 1975) (which

has a great deal to say about judicial review generally, but nothing whatever about Federal District Court jurisdiction except its view that the Administrative Procedures Act gives the Court jurisdiction over the Federal defendants); and Lewis v. Brinegar, supra (which also relies on the Administrative Procedure Act).

Thus, the cases which are relevant to the jurisdictional issue do not deal with the question of review of State agency decisions, and do not adequately deal with Title 28 U.S.C. § 1331(a).

They do not change the character of this suit which is a thinly disguised review of a State agency decision which rests precariously on a Federal Statute not directly applied to the State.

V.

ASSUMING PROPER JURISDICTION, THE COURT OF APPEALS ERRED IN ITS REVERSAL OF THE DISTRICT COURT DECISION

A. Introduction

This Court in its unanimous opinion in Berman v. Parker (1954) 348 U.S. 26, 99 L.Ed.27 75 S.Ct. 98, examined the role of redevelopment. The Court made many references to the public welfare involved in redevelopment activities. Among its statements was the following:

> "Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river." (348 U.S. at pp.32-33).

In dealing with these problems, communities have broad discretion. It is

within the province of legislatures ". . . to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully controlled." (348 U.S. at p. 33) This Court also recognized the importance of redesigning blighted areas so as to eliminate the conditions causing such areas, including, inter alia, ". . . outmoded street patterns" so that "a . . . balanced integrated plan could be developed for the region, including . . . streets, and shopping centers." (348 U.S. at 34, 35).

Implicit in all of this is the further responsibility of legislatures to allocate the costs of redevelopment programs. For years, Congress and State Legislatures, in undertaking this responsibility, have followed the common law rule that the relocation expenses of those utilities holding franchises in public streets was to

be borne by the utility rate-payor, unless the legislature determined otherwise. The specific instances of legislated exceptions from this general rule are legion (see Petitioners' Brief herein and argument, infra). As previously explained, the effect of the 4th Circuit opinion in this case would be to reverse this longstanding rule, throwing whole patterns of established legislation into disarray, and immediately taking substantial amounts of money away from housing and other critical needs in order to support the utility or its rate-payors who ought to bear the expense of bringing the utility service to them.

It is within the context of these policies that the merits of this case must be decided; not upon the narrow, definitional basis determined by the Court of Appeals.

Assuming arguendo that the District Court and the Court of Appeals for the

Fourth Circuit had proper jurisdiction, the Court of Appeals erred in ignoring the long-standing and universal rule that private utility companies and the persons benefitting from the utility's services must themselves bear the cost of relocating their facilities under circumstances such as those at bar unless specific statutory authority to the contrary is found.

B. Congress has not abrogated the common law rule

As articulated in the brief of the Petitioner Authority, the District Court and those other courts which have construed the URA with respect to whether a private utility company is a displaced person for purposes of receiving relocation assistance, have applied the common law rule and denied the claims of the utility companies. In Pacific Telephone and Telegraph Company v. Redevelopment Agency of Glendale, supra, the California court correctly stated the rule as follows:

"It is the common law rule, well established in California, that [i]n the absence of a provision to the contrary it has generally been held that a public utility accepts franchise rights in public streets subject to an implied obligation to relocate its facilities therein at its own expense when necessary to make way for a proper governmental use of the streets." (Southern Cal. Gas Co. v. City of L.A., 50 Cal.2d 713, 716, 329 P.2d 289, 290; L.A. County Flood Control Dist. v. Southern Cal. Edison Co., 51 Cal.3d 331, 334, 331 P.2d 1; City of San Pablo v. East Bay Mun. Utility Dist., 75 Cal.App.3d 609, 613, 142 Cal.Rptr. 256; Pacific Tel. & Tel. Co. v. Redevelopment Agency, 75 Cal.App.3d 957, 962, 142 Cal. Rptr. 584.) The vacating of a public street to make way for a redevelopment project to relieve urban blight under the community redevelopment law (Health & Saf. Code, § 33000 et seq.) is a proper governmental use of the streets. (City of San Pablo v. East Bay Mun. Utility Dist., supra, 75 Cal. App.3d at p. 615, 143 Cal.Rptr. 256; Pacific Tel. & Tel. Co. v. Redevelopment Agency, supra, 75 Cal.App. 3d at p. 969, 142 Cal.Rptr. 584.)

The Legislature may provide that the utility be compensated for relocating its facilites (Southern Cal. Gas Co. v. City of L.A. supra, 50 Cal.2d at p. 719, 329 P.2d 289), but "such right

> should not be deemed to have been given unless the Legislature specifically so provides." (Pacific Tel. & Tel. Co. v. Redevelopment Agency, supra, 75 Cal.App.3d at p. 964, 142 Cal.Rptr. at p. 589.)"
>
> 87 Cal.App.3d at 299-300, 151 Cal. Rptr. at 69-70. See Potomac Electric Power Co. v. Fugate, 211 Va. 745, 180 S.E.3d 657 (1971).

There is nothing in the URA, the California Relocation Assistance Act, or the Virginia URA which expressly reverses or modifies the common law rule. "Statutes are not presumed to alter the common law otherwise the act expressly provides." (Saala v. McFarland 63 Cal.2d 124, 130 45 Cal. Rptr. 144, 148 (1965); Estate of Hering 108 Cal.App.3d 88, 92, 166 Cal.Rptr. 298, 300 (1980)).

The Court of Appeals decision in this case ignores the impact of the common law rule, by stating merely that "The Act was intended to create rights that were not recognized at common law." 674 Fed.2d at 300. The Court itself acknowledged that

Congress failed to mention utilities during the debates on the URA and in the legislative history, ibid., but nonetheless found that "the Act was intended to extend benefits uniformly to persons who are are displaced by federal programs. Exclusion of utilities from the Act's coverage would run counter to that purpose." 674 Fed.2d at 300-301.

In light of the common law rule, recognized throughout the country, and the absence of any express provision with respect to utility companies, the Court of Appeals'construction of the statute and its inference of an intention on the part of Congress to create a right which the common law denies is without support.

C. The District Court's decision recognizes the appropriate rule

The Memorandum Opinion of the District Court below relied on the decisions of a number of other federal and state courts which have held under similar factual

situations and under the same state and federal statutory overview, a private utility company is not a displaced person for purposes of receiving relocation assistance. See: Consumer Power Co. v. Costle, 615 Fed.2d 1147 (6th Cir. 1980); Pacific Telephone and Telegraph v. Redevelopment Agency of Glendale, supra, 151 Cal.Rptr. 68, 87 Cal.App. 3d 296; Artesian Water Co. v. State Department of Highways and Transportation, 330 A.2d 432 (Del. 1974); Mountain States Telephone and Telegraph Co. v. Boise Redevelopment Agency, 607 P.2d 1084, 101 Idaho 30 (1980); Public Service of Oklahoma v. Harris, No. 79-C-37-35 (N.D. Okla., Aug. 22, 1980); Lone Star Gas Co. v. Moon Landrieu, No. 80-100-C (E.D. Okla., March 30, 1981). See also: Appalachian Power Co. v. City of Huntington, 210 S.E.2d 471 (W.Va., 1974); So. Union Gas Co. v. City of Artesia, 472 P.2d 368 (N.Mex., 1970); Bristol Tennessee

Housing Authority v. Bristol Gas Co., 407 S.W.2d 681 (Tenn., 1966).

The common factor present in each of the above-cited cases is that the reviewing court applied the common law rule and, finding that the State had not expressly provided for the reimbursement of utility companies for their relocation expenses, denied the claim of a private utility company.

Where the state legislature has, however, expressly required the payment of relocation assistance to private utility companies, courts have approved the claims of such companies. See: City of Columbus v. Indiana Bell Telephone Co., 281 N.E. 2nd 510 (Ind., 1972); City of Center Line v. Michigan Bell Telephone, 182 N.W. 2nd 769 (Mich., 1970).

These cases demonstrate that when the Legislature of a state intends that a utility be reimbursed for its relocation

costs, it will say so in specific and direct language. In California, for example, the Legislature has expressly provided for reimbursement of relocation costs of utility facilities maintained in freeways (Calif. Sts. & Hy. Code, §§ 702, 703), relocations required by the Southern California Rapid Transit District (Calif. Pub. Util. Code §30631), and relocations required by the Reclamation Board in connection with certain flood control projects (Calif. Wat. Code § 8617.5). The California Legislature has not provided for such reimbursement by redevelopment agencies acting pursuant to the California Community Redevelopment Law (Calif. Health and Safety Code §33000 et seq.).

The decision of the Court of Appeals, however, if applied to a California redevelopment agency, would simply disregard these legislative distinctions, and require that California State

redevelopment agencies receiving federal assistance must reimburse private utility companies for their relocation costs, regardless of State law. Such a result was clearly not intended by Congress when it enacted the URA, and lacks any justification, stated or implied, in terms of public policy.

D. Utility relocation costs should be left to the legislature

These amici agree with the California Court of Appeal in Pacific Telephone and Telegraph Co. v. Redevelopment Agency of the City of Glendale, supra, 87 Cal. App.3d at 301, 151 Cal. Rptr. at 70, where the Court stated "Whether the costs of such relocation should be shifted from the utility's rate payers to other taxpayers is a matter of policy for the Legislature to determine." (Citations omitted).

There may indeed be legitimate public purposes to be served by shifting the cost of utility relocations from one population

(e.g., the utility company's customers) to another (e.g., the public). As noted above, in California, the Legislature has found such a purpose when the activity involves freeway construction, mass transportation or flood control. The wholesale application of the Court of Appeals decision, however, would replace any rational legislative distinctions with a literal and unyielding rule.

Funds for the construction of housing for low income families by a redevelopment agency pursuant to the California Community Redevelopment Law, for example, would have to be diverted to pay utility companies for their costs in relocating their power lines or other facilities in connection with such activities, if the project were receiving any federal assistance. The result of such a redirection of scarce funds would be obvious; the amount available for construction of housing for the poor would simply be

reduced by the amount necessary to reimburse the private, profit-making utility companies. It is a legitimate concern of the Legislature to weigh the competing interests of the community and the utility companies, and to decide that the utility companies must pay for the relocation of their facilities under such circumstances. There is no indication that Congress meant to take this discretion away from the States. In fact, Congress itself engaged in a similar specific reimbursement of public utilities in enacting the District of Columbia Public Utilities Reimbursement Act of 1972 (Pub. Law No. 92-495).

Moreover, redevelopment agencies in California have no authority to levy taxes; their primary source of funds is tax increment generated by successful redevelopment projects which result in increased property values. The extent to which a redevelopment agency is capable of transforming blighted

and unproductive areas into areas whose property values may increase would likewise be diminished by syphoning off an agency's funds to a utility company instead of activities otherwise needed for redevelopment. Moreover, the utility companies themselves stand to gain from successful redevelopment. Where once stood blighted property, a redevelopment project can give rise to productive residential and commercial developments, resulting in increased use of utility company services. Yet, the utility companies seek to reap this benefit without cost to them. It is a legitimate exercise of legislative discretion to require the utility companies to share in the burden in light of their potential benefit.

It was improper, therefore, for the Court of Appeals to add this significant burden to a state redevelopment agency in

the absence of any specific legislative requirement.

CONCLUSION

Because the Federal District Court did not have jurisdiction of this case, and because the opinion of the Circuit Court was incorrect, it is respectfully urged that this Court reverse that decision with direction to the District Court to dismiss the case.

Respectfully submitted,

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